BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PATRICIA BRANDT, GERTRUDE BRANDT, LORI CRAVEN, ESTHER ERIKSON, WAYNE FELLER, MARY FELLER, GUY SAMPSON, MINETTA SAMPSON, HENRY WATSON and JEANNE WATSON, Petitioners, vs. MARION COUNTY, Respondent, and BLAZER INDUSTRIES, INC., Intervenor-Respondent.	LUBA No. 91-101 FINAL OPINION AND ORDER

On remand from the Court of Appeals.

M. Chapin Milbank, Salem, represented petitioners.

Robert C. Cannon, Salem, represented respondent.

Kenneth Sherman, Jr., Salem, represented intervenor-respondent.

SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON, Referee, participated in the decision.

REMANDED 06/02/92

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a county ordinance which (1) amends the Silverton Urban Growth Boundary (UGB) to add 8.7 acres, (2) changes the comprehensive plan map designation for the subject property from Agriculture to Industrial, (3) rezones the subject property from Exclusive Farm Use (EFU) to Industrial Commercial (IC), and (4) approves a conditional use permit for the manufacture of prefabricated structural wood products on the subject property.

FIRST LUBA DECISION

On December 19, 1991, this Board issued a final opinion and order remanding the challenged decision. Brandt v. Marion County, ___ Or LUBA ___ (LUBA No. 91-101, December 19, 1991) (Brandt I). We sustained petitioners' first and seventh assignments of error, in part, on the ground that the county's findings are inadequate to comply with Part II(c)(2) of Statewide Planning Goal 2 (Land Use Planning).[1] We also stated that Goal 14 (Urbanization) requires that in adopting a UGB amendment, a local government comply with the requirements of Goal 2, Part II

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[1]Under Goal 2, Part II(c)(2), one of the standards for approving a goal exception is:

> "Areas which do not require a new [goal] exception cannot reasonably accommodate the use[.]"

Goal 2, Part II has been codified at ORS 197.732. Goal 2, Part II(c)(2) is also ORS 197.732(1)(c)(2).

for goal exceptions. Brandt I, slip op at 5-11.

We denied petitioners' other assignments of error. In the second assignment of error, petitioners contended the county erred in finding compliance with Goal 3 (Agricultural Lands). Petitioners argued the following finding is conclusory and not supported by substantial evidence in the record:

> "This expansion will occur on land that, even though it is zoned EFU, is not now nor likely to be used for agricultural production. * * *" Record e.

We denied this assignment of error on the ground that petitioners failed to explain why the above quoted finding is essential to demonstrating compliance with an applicable approval standard. Brandt I, slip op at 12.

Petitioners appealed our decision to the Court of Appeals.

COURT OF APPEALS DECISION

On March 11, 1992, the Court of Appeals issued an opinion reversing and remanding our decision for reconsideration of the second assignment of error, and otherwise affirming our decision. Brandt v. Marion County, 112 Or App 30, ___ P2d ___ (1992). The Court of Appeals stated:

> "* * * The preservation of agricultural land for agricultural use is the sine qua non of Goal 3. A finding concerning the present or likely future agricultural use of EFU land that is the subject of a proposal for nonagricultural zoning can have a central bearing on the determination of whether

> the proposal complies with the goal. In the context of the county's other findings, the [above quoted] finding was, on its face and without any need for explanation, 'essential to the decision.' We remand for LUBA to address the merits of the assignment." Brandt v. Marion County, 112 Or App at 32-33.

SECOND ASSIGNMENT OF ERROR

Pursuant to the Court of Appeals' direction, we determine whether the above quoted finding is supported by substantial evidence in the whole record.[2]

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1974); Van Gordon v. Oregon State Board of Dental Examiners, 63 Or App 561, 567, 666 P2d 276 (1983); Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777 (1976). Where a reasonable person could reach the conclusion made by the local government, in view of all the evidence in the record, we defer to the local government's choice between conflicting evidence. Younger v. City of Portland, 305 Or 356, 360, 752 P2d 262 (1988); Wissusik v. Yamhill County, 20 Or LUBA 246, 260 (1990); Vestibular Disorder Consult. v. City of Portland, 19 Or LUBA 94, 103

[2]Although petitioners assert the challenged finding "suffer[s from] the conclusionary syndrome," petitioners do not explain why they believe the finding to be impermissibly conclusory. Petition for Review 7. Therefore, we limit our consideration of this assignment of error to petitioners' challenge of the evidentiary support for the finding.

(1990); Douglas v. Multnomah County, supra, 18 Or LUBA at 617.

We have reviewed the relevant evidence in the record cited by the parties. The evidence indicates that the subject 8.7 acres consist of Class II and some Class IV agricultural soils. Record 562, 565. The subject property was planted with berries in the early 1920's. Record 505. From 1926 through World War II, the subject property was planted in grass and used as an airstrip. From around 1950 until 1981, grass, hay and clover were raised on the subject property, except for a 30 ft. wide landing strip which was kept mowed and rolled. After 1981, the subject property was farmed until it was sold to its present owner in 1987. Id. In recent years, the property has produced cuttings of grass hay.[3] Record 183, 367. The person who farmed the property from 1981 through 1987 also testified that he currently "farms what is considered the old airport and adjacent property." Record 184. He described the subject property as "marginal farm land, rocky, low and does not drain well" and "narrow and not acceptable for farming." Id. Other area residents and farmers described the subject property as "prime" agricultural land with very fertile soil. Record 287, 291, 499-500, 535, 543.

[3]There is conflicting information in the record as to whether the property usually produces one (Record 183) or two to three (Record 367) cuttings of grass hay per year.

The challenged finding states the subject property (1) is not now used for agricultural production, and (2) is not likely to be used for agricultural production in the future. With regard to part (1), the evidence in the record establishes that the subject property is currently used to produce grass hay. Therefore, part (1) of the finding is not supported by substantial evidence.

With regard to part (2), a reasonable person could choose to rely on the present farmer's description of the subject property as "marginal" farm land with poor drainage, rather than neighboring property owners' descriptions of the subject property as "prime" farm land with very fertile soil. However, even if the subject property is properly described as marginal farm land with poor drainage, in view of the undisputed historic and current use of the property for agricultural production and the Class II and IV agricultural soils found on the property, we do not believe a reasonable person would conclude it is not likely that the subject property will be used for agriculture in the future. Therefore, part (2) of the finding also is not supported by substantial evidence.

The second assignment of error is sustained.

CONCLUSION

Our decision in Brandt I is modified, as set out above, with regard to petitioners' second assignment of error. We otherwise adhere to our decision in Brandt I.

The county's decision is remanded.